Supreme Court, U.S.
FILED
JUN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1792

In the Supreme Court of the United States

OCTOBER TERM, 1988

BILLY J. CONLEY,
Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

THOMAS E. DEACY, JR.
(Counsel of Record)
SPENCER J. BROWN
THOMAS M. DEACY
DEACY AND DEACY
1000 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106
(816) 421-4000
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

SUPREME COURT RULE 28.1 STATEMENT

Respondent's parent company is Burlington Northern, Inc. The partially owned subsidiaries and affiliates of petitioner and petitioner's parent are:

The Belt Railway Company of Chicago

Camas Prairie Railroad Company

Davenport, Rock Island and North Western Railway Company

The Denver Union Terminal Railway Company

Galveston Terminal Railway Company

Houston Belt & Terminal Railway Company

Iowa Transfer Railway Company

Kansas City Terminal Railway Company

Keokuk Union Depot Company

The Lake Superior Terminal and Transfer Railway Company

Longview Switching Company

The Minnesota Transfer Railway Company

Paducah & Illinois Railroad Company

Portland Terminal Railroad Company

The Pueblo Union Depot and Railroad Company

The Saint Paul Union Depot Company

Terminal Railroad Association of St. Louis

Trailer Train Company

The Wichita Union Terminal Railway Company

Winona Bridge Railway Company

TABLE OF CONTENTS

SUPREME COURT RULE 28.1 STATEMENT I
TABLE OF AUTHORITIES II
SUMMARY OF REASON WHY THE PETITION SHOULD NOT BE GRANTED 1
STATEMENT OF THE CASE 2
REASONS FOR DENYING THE WRIT 4

A. This Case Does Not Present Any Novel Issues Of Law Under The Federal Employers' Liability Act, Rather It Involves The Application Of Facts To Established Law 4

B. This Case Presents No Issues Of Public Importance 4

CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Conley v. Burlington Northern R. Co., 765 S.W.2d 272 (Mo.App. 1988) 3
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 4
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 4-5
Taylor v. Burlington Northern R. Co., 787 F.2d 1309 (9th Cir. 1986) 4

Statute

45 U.S.C.A. §15 3

No. 88-1792

In the Supreme Court of the United States

OCTOBER TERM, 1988

BILLY J. CONLEY,
Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

SUMMARY OF REASONS WHY THE PETITION SHOULD NOT BE GRANTED

The petitioner was awarded $200,000 in the trial court after his damages were reduced by 60% for his contributory negligence in failing to report to respondent that his work assignments were causing pain in his ankle. The Missouri Court of Appeals, Western District affirmed the judgment finding no error in the submission of con-

tributory negligence and holding that the submission of plaintiff's negligence did not constitute assumption of the risk. The petition does not challenge the application of the provisions of the Federal Employers' Liability Act 45 U.S.C. §53. The sole issue raised here is the sufficiency of the evidence for submission of plaintiff's contributory negligence to the jury. The petition does not present any novel legal questions and does not raise any matters of public importance.

STATEMENT OF THE CASE

Petitioner twisted his ankle while at work for respondent in the early morning of November 17, 1979. Petitioner did not report the injury to his supervisor before leaving work that day. On November 23, 1979 after two visits to an orthopedic surgeon plaintiff was released by the physician to return to work. He was told that he should wear an elastic bandage and try to limit the amount of his standing and walking and that if his ankle bothered him in the next seven to ten days he should see the doctor again. Upon his return to work on November 23, 1979, petitioner assured his supervisor that his ankle was not hurting, and he was put on light duty. Several days later, petitioner again assured his supervisor that his ankle was not bothering him, and he returned to his regular duties. After petitioner returned to regular duty he did not complain to his supervisors of his ankle hurting nor did his supervisors observe petitioner limping or exhibiting any other indication that his ankle bothered him until August 5, 1982.

On August 5, 1982 petitioner's supervisor noticed petitioner limping and immediately asked him to see a

doctor. On that date Dr. Gottsch examined petitioner and advised him to wear an elastic ankle support while working and to apply heat in the event he experienced recurrent episodes of pain. Dr. Gottsch did not tell petitioner that he should not work. Petitioner went back to work on August 7, 1982 and between then and December 29, 1982 he gave his supervisor no indication that he was not 100% physically able to perform his duties.

At no time during petitioner's employment with respondent did his supervisors ever receive a report or have a conversation with any doctor who reported to them that petitioner should not work or that petitioner's duties would cause him any permanent, chronic or new injury to his ankle. Shortly after December 29, 1982 petitioner informed his supervisor that he was unable to work, and thereafter his employment with respondent ended.

On February 10, 1983 petitioner initiated this action seeking damages for aggravation of the November 17, 1979 ankle injury which he claimed resulted from respondent's negligent assignment of him to duty as a special agent. Petitioner's claim is not for the initial injury. That claim is barred by 45 U.S.C.A. §15. At trial the jury found in favor of petitioner on his claim against respondent but found that petitioner was 60% at fault in failing to report to respondent that his work assignments were causing pain in his ankle. The Court below rejected petitioner's appeal concluding that "plaintiff's negligent failure to report his pain, if found by the jury, tended to add new dangers to the conditions of his employment." The Court further concluded that the respondent's instruction on contributory negligence was proper. *Conley v. Burlington Northern R. Co.*, 765 S.W.2d 272, 276 (Mo.App. 1988).

REASONS FOR DENYING THE WRIT

A. This Case Does Not Present Any Novel Issues Of Law Under The Federal Employers' Liability Act, Rather It Involves The Application Of Facts To Establish Law.

Petitioner admits that he did not tell his supervisors that because of pain in his ankle he could not continue to perform his regular work duties. The Court below applied those facts to the established law announced in *Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309 (9th Cir. 1986) and concluded that petitioner's failure to report his pain did not constitute assumption of risk. Petitioner here merely seeks another review of the application of facts to established law which is not properly sought before this Court. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). In sum, petitioner does not raise a legal issue here, but only seeks review of the evidence under the very law applied below.

B. This Case Presents No Issues Of Public Importance.

Petitioner does not assert that the Court below has relied on incorrect legal grounds in coming to its decision. Rather petitioner challenges the Court's application of the uncontested facts to the law. Nor does petitioner claim that the Court below has consistently or indeed ever misapplied the law which he relies upon. Accordingly, petitioner presents matters which are important only to himself and not to the general public. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261

U.S. 387, 393 (1923). After two trials and two appeals petitioner has had every opportunity to develop his case and it is now appropriate to put this litigation to rest.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

THOMAS E. DEACY, JR.
(Counsel of Record)
SPENCER J. BROWN
THOMAS M. DEACY
DEACY AND DEACY
1000 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106
(816) 421-4000
Attorneys for Respondent